

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN M. AND MARY JO FILLER	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and Chapter 46, Title T of the Administrative	:	
Code of the City of New York for the Year 1982.	:	

Petitioners, Martin M. and Mary Jo Filler, 57 Bay Street, Staten Island, New York 10305, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1982 (File No. 803976).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on March 25, 1988 at 10:15 A.M. Petitioners appeared by Wayne Caputo, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether a claim for refund was timely mailed under Tax Law § 687(a) when it was mailed by ordinary (nonregistered) mail, but where there is no record of its receipt by the Division of Taxation.

II. Whether the special refund authority of Tax Law § 697(d), allowing a refund without regard to any limitation period where there is no question of law or fact involved, can be exercised in this case where the claim for refund is for taxes which were withheld from wages.

FINDINGS OF FACT

1. Petitioners reside on Staten Island, New York. Mr. Filler is an attorney. Mrs. Filler is a nurse.

2. For 1982, petitioners prepared their New York personal income tax returns and showed a refund due of \$1,050.09. The refund resulted from New York State and New York City taxes withheld from wages paid to Mrs. Filler. The wage withholding form (W-2) was attached. Petitioners did not file the return on or before the due date. No extension of time for filing was granted.

3. The 1982 return was mailed to the Division of Taxation, late, on April 10, 1984. Petitioners' accountant in 1984 had discovered that a previous accountant had not completed the State return, and he completed it himself. Mr. Filler, after consulting the accountant, remembers this and also remembers mailing the return. Petitioners' sworn testimony as to the mailing of the return on that date is credible and is accepted as proof of the fact. This return, however,

according to the records of the Audit Division, was never received.

4. On March 26, 1986, the Audit Division sent petitioners a Statement of Audit Changes asserting taxes due of \$2,471.09. The deficiency was based on information received from the Federal government.

5. On April 16, 1986, petitioners mailed a letter with copies of their 1982 return showing the claim for refund to the Audit Division and stating that the original return was mailed on April 10, 1984. This letter was received. The copy of the return itself was dated April 10, 1984.

6. On June 27, 1986, a Notice of Deficiency was issued to petitioners in the amount of \$1,385.00, plus penalty and interest.

7. The petition in this case was received on September 26, 1986. Attached to it was another copy of the tax return.

8. On February 11, 1987, the Audit Division, by letter, cancelled the Notice of Deficiency. It acknowledged receipt in April 1986 of copies of the 1982 return and denied any refund as untimely.

CONCLUSIONS OF LAW

A. The mailing of the 1982 return together with the claim for refund on April 10, 1984 which was not received by the Department must, because of that nonreceipt, be found to be ineffective as the "filing" of a claim for refund. A filing of a claim for refund is required by Tax Law § 687(a). This section copies the language of section 6511(a) of the Internal Revenue Code and was enacted by chapter 1011 of the Laws of 1962. That legislation was intended to conform New York income tax procedures to Federal procedures so as "to avoid injustices resulting from differing Federal and State remedies..." (1962 NY Legis Ann, at 241). Under section 6511(a) of the Internal Revenue Code, the "filing" of a claim has been construed to require physical delivery to the recipient (see ___ Poynor v. Commissioner, 81 F2d 521, 522; Miller v. United States, 784 F2d 728, 730). Petitioner wishes to prove physical delivery to the Department by reliance on the rule of common law that a properly mailed letter is presumed to have been received (see ___ News Syndicate Co. v. Gatti Paper Stock Corp., 256 NY 211). However, specific rules with regard to mailing of documents, including claims for refund, are included in Tax Law § 691. This section was also enacted in 1962 and was copied from section 7502 of the Internal Revenue Code and accordingly should be construed the same way as the Federal section (Matter of Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988). Section 7502 of the Code provides that if a document is delivered late by the Post Office, then the postmark shall be deemed to be the date of delivery if the postmark itself was timely and the document was properly mailed. (It provides further that mailing by registered mail shall be prima facie evidence of delivery and also provides for regulations to cover certified mail and privately metered mail.) A Federal court has held in a case involving ordinary mail which was not received, that because of such nonreceipt, section 7502 did not apply and that since previous cases involving late-postmarked mail had precluded any other evidence of receipt then in the case of non-received ordinary mail, the court must preclude other evidence. The court said, "section 7502 and the cases construing it demonstrate a penchant for an easily applied, objective standard." (Deutsch v. Commissioner, 599 F2d 44). The result is that the common law presumption of mailing is ruled out. This has been followed by the New York State Tax Appeals Tribunal in Matter of Sipam Corporation (Tax Appeals Tribunal, March 10, 1988). The Deutsch case so construing section 7502 involved petitions to redetermine deficiencies and the court noted that

the petitioner still had a remedy of paying the tax and applying for a refund (thus avoiding constitutional problems) (Deutsch v. Commissioner, 599 F2d 44, 46). However, subsequent cases have applied this same conclusion to claims for refund even though other remedies are not available (Miller v. United States, 784 F2d 728). In one such refund case, the court even noted that the statute was not merely harsh but in fact "produced a gross injustice" to the taxpayer and yet decided against the taxpayer (United States v. Cope, 680 F Supp 912, 919). In any event, the result is that a taxpayer mailing a claim for refund or other document to the Internal Revenue Service must himself bear the risk of nondelivery by the Post Office and, it must be especially noted, bear any further risk of any mishandling after receipt by the Internal Revenue Service. The same risks apply to mailings to the New York State Tax Department. Of course it is open to any petitioner to attempt to prove the receipt of his petition by other means. (Compare Matter of MacLean v. Procaccino, 53 AD2d 965 [involving proof of mailing by the Tax Department].) This probably would entail a request for a subpoena (see ___ CPLR § 2307) for Tax Department records. The difficulties of this are apparent. In any event, the common law presumption of mailing, the sole reliance of the petitioners in this case, is ineffective. The mailing on April 10, 1984 cannot be the basis of a refund.

The filing of the 1982 tax return showing a claim for refund on April 16, 1986 cannot be the basis of a refund. The return itself can be considered as filed on that date. Although the claim for refund would then be timely made as within three years of the filing of the return, still no refund is due because the amount of any refund is restricted to the amount paid within the three years preceding the claim including any period of extension of time for filing the return (Tax Law § 687[a]). In this case, of course, there was no extension of time and the return was late so the period is restricted to three years. The April 16, 1986 date is more than three years after April 15, 1983 when the pre-paid taxes are deemed to have been paid (Tax Law § 687[i]). Therefore, there can be no refund based on the April 16, 1986 filing.

B. Relief in this case, however, is available. Tax Law § 697(d) gives authority at any time to make a refund where:

"no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts,...."

In this case, the tax return as filed showed amounts listed as prepayments and attached a withholding form. The refund was claimed on the return. Any tax examiner who would have examined this return (whenever it was filed) could have seen that there was an overpayment caused by over-withholding and thus that monies have been collected from the taxpayer under a mistake of fact by over-withholding. No questions of fact or law appear on the face of the return. While this authority is stated in Tax Law § 697(d) to be vested in the Tax Commission, it appears that by Tax Law § 2026 (see also Tax Law § 177) any reference to the tax commission in relation to the administration of the administrative hearing process "shall be deemed to refer to the Division of Tax Appeals or the Tax Appeals Tribunal". The authority under Tax Law § 697(d) was exercised by the State Tax Commission as part of the administrative hearing process (see ___, e.g., Matter of Irving Miller and Lillian Miller, State Tax Commission, June 25, 1974; Matter of Wuebben, State Tax Commission, February 11, 1983). It would therefore also be within the jurisdiction of the Division of Tax Appeals (see ___ Tax Law § 2000).

C. The petition of Martin M. and Mary Jo Filler is granted, and the Audit Division is

directed to refund the sum of \$1,050.09, plus whatever interest may be lawfully due and owing.

DATED: Albany, New York

September 29, 1988

/s/ Nigel G.

Wright _____
ADMINISTRATIVE LAW JUDGE